

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**L.S., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Tampa, FL, Employer**

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**Docket No. 17-0203  
Issued: April 5, 2017**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant<sup>1</sup>*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On November 8, 2016 appellant, through counsel, filed a timely appeal from a September 16, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated July 6, 2015, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

## **FACTUAL HISTORY**

On June 5, 2014 appellant, then a 42-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that he sustained bilateral degenerative knee conditions on or before April 22, 2014 in the performance of duty. He attributed these conditions to prolonged walking and standing. Appellant mentioned an alleged employment-related accident occurring on February 12, 2013,<sup>3</sup> in which he was struck by a crab cage and experienced back and right knee pain. He stopped work on May 17, 2014.

Appellant provided June 6, 2014 x-rays of both knees showing degenerative changes with joint space narrowing and osteophyte formation. A June 9, 2014 magnetic resonance imaging (MRI) scan of the left knee showed lateral patellar subluxation, multiple surface tears of the posterior horn of the medial meniscus, and diffuse soft tissue swelling.<sup>4</sup>

In a July 9, 2014 letter, OWCP advised appellant of the additional evidence needed to establish his claim, including a report from his attending physician explaining how and why the identified work factors would cause the claimed bilateral knee condition.

In response, appellant submitted an undated statement noting that he experienced several months of knee and back pain following the alleged February 12, 2013 employment injury. While working as an acting dock supervisor beginning in December 2014, he experienced increased knee pain which he attributed to his new job duties. Appellant asserted that his left knee worsened due to overcompensating for his injured right knee.

Dr. Harvey Bishow, an attending Board-certified orthopedic surgeon, provided a June 3, 2014 report reiterating appellant's account of the alleged February 12, 2013 employment injury, with the onset of bilateral knee pain and swelling on April 22, 2014. He diagnosed internal derangement of both knees. On June 17, 2014 Dr. Bishow diagnosed medial and lateral meniscal tears superimposed on degenerative joint disease of both knees. He opined that the alleged February 12, 2013 employment injury "was the proximate and direct cause" of appellant's bilateral knee condition. Dr. Bishow held appellant off work.

Dr. Richard M. Blecha, an attending Board-certified orthopedic surgeon, examined appellant on July 30, 2014. He diagnosed degenerative arthritis, patellar subluxation, and a torn medial meniscus of the right knee. Dr. Blecha prescribed physical therapy.

Dr. Robert Reppy, an attending osteopath Board-certified in family practice, noted on August 6, 2014 that appellant weighed 455 pounds. He diagnosed bilateral meniscal tears and

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<sup>3</sup> Under File No. xxxxxx901, appellant claimed a February 12, 2013 traumatic right knee injury. OWCP denied the claim. That claim is not before the Board on the present appeal.

<sup>4</sup> Appellant also submitted June 2014 physical therapy notes.

osteoarthritis, with chondromalacia of the right patella. Dr. Reppy held appellant off work. In an August 13, 2014 letter, he provided an account of an occupational left knee injury in which a crab cage struck appellant's left hip, "knocking him into another person and causing him to twist his left knee as he fell to the ground." Dr. Reppy opined that the twisting motion of the fall caused meniscal tears in the left knee, with chondromalacia and osteoarthritis due to wear and tear when he returned to work following the traumatic incident. He explained that meniscal tears were caused by "rotational motion of the knee joint while weight is on it. This is precisely what occurred with [appellant] when he twisted his knee as he fell.... [T]he condyle of the end of the femur catches on the thin central edge of the meniscus as it tapers toward the center, and then when the knee rotates, it grabs the meniscal cartilage with it as it rotates and causes it to tear." Dr. Reppy opined that appellant's "right knee injury must be considered as a consequential injury subsequent to profound gait disturbances in response to accommodating the left knee injury." He commented that appellant's morbid obesity would complicate and accelerate degenerative joint disease, but was not the sole cause. On September 4, 2014 Dr. Reppy noted that appellant would undergo bariatric surgery.

By decision dated September 16, 2014, OWCP denied the claim, finding that the medical evidence of record was insufficient to establish causal relationship. It accepted that appellant's duties required prolonged standing and walking as alleged. However, appellant's physicians did not explain how or why these work factors would cause a bilateral knee condition.

Appellant disagreed and requested that a telephonic hearing be held before an OWCP hearing representative on May 4, 2015. At the hearing, counsel asserted that appellant's bilateral knee condition was due to rotational forces as described by Dr. Reppy, and not the alleged February 12, 2013 employment injury. He alleged that OWCP sought to deny appellant's occupational disease claim as it previously rejected his traumatic injury claim. Appellant contended that he had no traumatic injury to his legs other than the February 12, 2013 right knee injury. He submitted additional medical evidence.

Dr. Reppy released appellant to restricted duty for four hours a day on or about September 17, 2014. He increased appellant's schedule to eight hours a day as of November 14, 2014. On January 5, 2015 Dr. Reppy opined that the cumulative effect of years of prolonged walking and standing at work, along with the rotational force of twisting while sorting mail, caused appellant's bilateral meniscal tears. On April 14, 2015 he reiterated that the rotational forces of twisting while sorting mail caused microtraumas of the cartilage in both knees, resulting in meniscal tears. Meniscal degeneration caused stress on bones, resulting in the surface wear and osteoarthritis.

Dr. Bishow provided December 9, 2014 and January 28, 2015 reports noting continuing bilateral knee pain due to meniscal tears and osteoarthritis. He commented that appellant was working full time with restrictions.

In a July 6, 2015 decision, an OWCP hearing representative affirmed the September 16, 2014 decision, finding that the medical evidence of record was insufficient to establish causal relationship. She found that Dr. Reppy's reports were insufficient to meet appellant's burden of proof as they were contradictory and factually inaccurate. The hearing representative observed that Dr. Bishow noted that appellant had right knee pain after the alleged February 21, 2013

employment injury, whereas Dr. Reppy reported no history of right knee pain before April 22, 2014. Also, Dr. Reppy variously attributed appellant's knee conditions to his work "duties" and to work "events." Additionally, his August 13, 2014 report appeared to reverse the history of injury, noting that a February 12, 2013 left knee injury caused consequential right knee conditions. Appellant then appealed to the Board.

During the pendency of the prior appeal, appellant submitted to OWCP periodic reports from Dr. Reppy dated from September 29, 2015 to May 24, 2016, noting an improvement in appellant's bilateral knee pain due to significant weight loss following a March 2015 lap band surgery. He diagnosed chondromalacia of the right patella, bilateral medial meniscus tears, and bilateral knee osteoarthritis.<sup>5</sup> On April 19, 2016 Dr. Reppy opined that these conditions were "directly and proximately caused by the April 2, 2014 injury ... rather than his daily life activities. The diagnoses are pathomechanically related to work. [Appellant's] condition will never be what it would have been without the injury."

By order issued June 20, 2016, the Board dismissed the appeal docketed as 16-0285 at counsel's request.<sup>6</sup>

On June 21, 2016 counsel requested reconsideration of the July 6, 2015 decision. He submitted additional medical evidence.

Dr. Reppy provided a February 16, 2016 narrative report addressing the deficiencies noted by the hearing representative. He concurred with Dr. Bishow that appellant sustained a February 12, 2013 right knee injury, but that it had resolved before the April 22, 2014 right knee injury. Dr. Reppy noted that OWCP misinterpreted this history as an absence of all right knee symptoms before the accepted April 22, 2014 injury. He explained that the February 12, 2013 incident caused a meniscal tear in the right knee, which over time caused a consequential meniscal tear in the left knee. Dr. Reppy noted that the right meniscal tear was directly caused by the February 12, 2013 work incident. He clarified that in his August 13, 2014 report, he meant to refer to the right knee injury as being first in time, with the left knee conditions consequential to that injury. Dr. Reppy also clarified that he used the terms "work duties" and "work events" interchangeably, as appellant's work duties were occupational events.

Dr. Reppy submitted periodic chart notes from June 29 to August 24, 2016. In an August 25, 2016 letter, he requested that OWCP use the correct diagnoses of chondromalacia patella, right knee, bilateral medial meniscus tears, and osteoarthritis of both knees.<sup>7</sup>

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<sup>5</sup> An October 19, 2015 MRI scan of the right knee showed a tear of the posterior horn of the medial meniscus, and mild-to-moderate osteoarthritis of the medial joint space. An October 19, 2015 MRI scan of the left knee showed anterior horn and medial meniscal tears, and moderate-to-severe osteoarthritis of the medial joint space. Appellant participated in physical therapy from November 2015 through June 2016.

<sup>6</sup> *Order Dismissing Appeal*, Docket No. 16-0285 (issued June 20, 2016).

<sup>7</sup> Appellant participated in physical therapy in July and August 2016.

By decision dated September 16, 2016, OWCP denied appellant's request for reconsideration, finding that the additional evidence submitted was cumulative and repetitious, and therefore did not warrant a review of the merits of the claim.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>8</sup> section 10.606(b)(3) of Title 20 of the Code of Federal Regulations provides that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.<sup>9</sup> Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>10</sup>

In support of a request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.<sup>11</sup> Appellant need only submit relevant and pertinent new evidence not previously considered by OWCP.<sup>12</sup> When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(3) to the claimant's application for reconsideration and any evidence submitted in support thereof.<sup>13</sup>

### **ANALYSIS**

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim.

On June 21, 2016 OWCP received appellant's timely request for reconsideration. By decision dated September 16, 2016, it found that he had failed to submit relevant and pertinent new evidence or argument in support of his reconsideration request and denied reconsideration of the merits of his occupational disease claim.

The most recent merit decision in this case is the July 6, 2015 decision of OWCP's hearing representative. The hearing representative denied appellant's occupational disease claim for bilateral knee conditions, finding that the opinion of Dr. Reppy, an attending osteopathic physician Board-certified in family practice, was inaccurate and contradictory. He contended that Dr. Reppy did not include a history of right knee pain prior to April 22, 2014, that he

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<sup>8</sup> 5 U.S.C. § 8128(a).

<sup>9</sup> 20 C.F.R. § 10.606(b)(3).

<sup>10</sup> *Id.* at § 10.608(b). *See also D.E.*, 59 ECAB 438 (2008).

<sup>11</sup> *Helen E. Tschantz*, 39 ECAB 1382 (1988).

<sup>12</sup> *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

<sup>13</sup> *Annette Louise*, 54 ECAB 783 (2003).

attributed appellant's knee conditions both to work "duties" and work "events," and that Dr. Reppy's August 13, 2014 report referred to the left knee where it should have addressed the right knee.

In support of his request for reconsideration, appellant submitted additional reports from Dr. Reppy, including a February 16, 2016 narrative report. Dr. Reppy directly addressed the points mentioned by the hearing representative, explaining that a prior right knee injury had resolved completely prior to April 22, 2014, and that work duties and events were interchangeable terms. He also clarified that, in his August 13, 2014 report, he meant to refer to appellant's right knee where he referred to the left knee instead.

It is well established that the requirement for reopening a claim for further merit review before OWCP does not require a claimant to submit all evidence necessary to discharge his burden of proof. Rather, the requirement for reopening a case specifies only that the evidence be relevant, pertinent, and not previously considered by OWCP. The presentation of such new evidence creates the necessity for review of the full case record in order to properly determine whether the newly submitted evidence warrants modification of an earlier decision.<sup>14</sup>

In this case, appellant responded to specific deficits in his medical evidence described by the hearing representative and submitted additional reports from Dr. Reppy to address these defects. Dr. Reppy's new reports, in particular his February 16, 2016 narrative, were new to the record and relevant to the issue of causal relationship adjudicated by the hearing representative's July 6, 2015 decision.<sup>15</sup> The Board finds that these new reports are relevant and pertinent to the issue of whether appellant sustained a bilateral knee condition in the performance of duty. Thus, a merit review is warranted.

On appeal, counsel asserts that OWCP's September 16, 2016 decision is contrary to fact and law. As set forth above, the case will be remanded for additional development.

### **CONCLUSION**

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim under 5 U.S.C. § 8128 of FECA.

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<sup>14</sup> *D.B.*, Docket No. 16-1214 (issued December 6, 2016).

<sup>15</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 16, 2016 is set aside and the case is remanded to OWCP for further actions consistent with this decision.

Issued: April 5, 2017  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board